FILED
AUG 18 1980
MICHAEL RODAK, JR., CLERK

80-5272

RECEIVED
AUG 2 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Case No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1980

WILLIAM H. BROWN,
Appellant,

vs.

~~GOODYEAR TIRE & RUBBER COMPANY, and~~
~~TRAVELERS INSURANCE COMPANY, and~~
WORKMEN'S COMPENSATION FUND,
Appellees.

On Appeal From The Kansas Supreme Court

JURISDICTIONAL STATEMENT

George E. McCullough
McCULLOUGH, WAREHEIM & LaBUNKER
1507 Topeka Avenue
P. O. Box 1453
Topeka, Kansas 66601
(913) 233-2323
Attorneys for Appellant

Question Presented

DID THE SUPREME COURT OF KANSAS ERR AS A MATTER OF LAW IN HOLDING THAT THE PROVISIONS OF K.S.A. 44-510f(c), NOW REPEALED, WERE CONSTITUTIONAL WHILE IN EFFECT AND DID NOT DISCRIMINATE AGAINST APPELLANT ON THE BASIS OF AGE, NOR VIOLATE HIS RIGHTS UNDER THE FOURTEENTH AMENDMENT?

Parties To The Proceeding

WILLIAM H. BROWN,

Appellant,

vs.

GOODYEAR TIRE & RUBBER COMPANY, and
TRAVELERS INSURANCE COMPANY, and
WORKMEN'S COMPENSATION FUND,

Appellees.

Table of Contents

	Page
Question Presented	1
Parties to the Proceeding	2
Opinion Below	3
Jurisdiction	4
Statute Involved	5
Statement of the Case	6
Statement of Reasons	7
Conclusion	10
Certificate of Service	11
Appendix 1	12
Appendix 2	14
Appendix 3	25

Table of Authorities

	Page
K.S.A. 44-510f(c)	5
Brown v. Saginaw Metal Cnst. Plants, C.M. Div., 68 Mich. App. 85, 241 N.W.2d 769	9
Chapman v. Wilkenson Co., 222 Kan. 772, 567 P.2d 888	7
Daugherty v. National Gypsum Co., 182 Kan. 197, 318 P.2d 1012	7
Gutierrez v. Harper Construction Co., 194 Kan. 287, 398 P.2d 178	7
Henry v. Bauder, 213 Kan. 751, 518 P.2d 362	9
Marshall v. Andrew F. Mahoney Co., 56 F.2d 74 (9th Cir. 1932)	9
Massachusetts Board of Retirement, et al v. Murgia, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed 520 (Marshall, J., dissenting)	9
Morales v. Mentor, 393 F.Supp. 88, (D. Mass. 1975)	9
Pinkerton v. Schwiethale, 208 Kan. 596, 493 P.2d 200	9
Wengler v. Druggists Mutual Ins. Co., 48 L.W. 4459 (April 22, 1980)	9

Opinion Below

The trial Court, District Court of Shawnee County, Kansas, held on March 5, 1979, that the provisions of K.S.A. 44-510f(c) did not discriminate against petitioner on the basis of age or violate his rights under the Fourteenth Amendment. The Kansas Court of Appeals sustained the District Court's judgment on September 21, 1979, said decision reported at 3 Kan.App.2d 648, 599 P.2d 1031, and attached hereto as Appendix 3. The Kansas Supreme Court affirmed the judgment of the Court of Appeals on April 5, 1980, rehearing denied May 19, 1980, said decision reported at 227 Kan. 648, P.2d , and attached hereto as Appendix 2.

Jurisdiction

The jurisdiction of this Court is evoked 28 U.S.C. §1257(2).

The judgment of the Kansas Supreme Court was entered on April 5, 1980, rehearing denied May 19, 1980.

The notice of appeal was filed on August 6, 1980, in the Kansas Supreme Court and is attached hereto as Appendix 1.

Statute Involved

The statute involved is Kansas Statutes Annotated, Section 44-510f(c), which provides:

> (c) An employee shall not be entitled to compensation benefits for permanent total disability, temporary total disability or partial disability, under the workmen's compensation act, from and after the date when he shall be entitled to and during such period as he shall receive federal old age social security benefits, reduced or unreduced.

Statement of the Case

This is a workmen's compensation case involving the validity of K.S.A. 44-510f(c), since repealed.

On May 5, 1976, appellant was found to be totally disabled by reason of work related injuries occurring in November, 1974, and April, 1975. Appellant was awarded temporary total benefits, as well as medical expenses, which the Worker's Compensation Fund was required to pay. Appellant became 65 years of age on September 5, 1977, and has received federal old age social security benefits since his 65th birthday.

The Workers' Compensation Fund thereafter filed a motion with the Division of Workers' Compensation of the state of Kansas for an order terminating appellant's disability benefits pursuant to K.S.A. 44-510f(c), now repealed, but in effect on the date of appellant's injuries. The motion was sustained and appellant's temporary total disability benefits were terminated as of September 5, 1977.

Appellant argued, inter alia, at every stage of the proceedings, both in his briefs on the merits and at oral arguments, that K.S.A. 44-510f(c) was unconstitutional in that the statute discriminated against appellant on the basis of age and violated his rights under the Fourteenth Amendment.

The order of the examiner of the Division of Worker's Compensation was sustained by the director of the Division of Workers' Compensation. The order was subsequently affirmed by the District Court of Shawnee County, Kansas, the Kansas Court of Appeals and the Kansas Supreme Court.

Statement of Reasons

The basis of workers' compensation is an attempt by the legislature to compensate for the loss or impairment of a worker's capacity for earning. In essence, the objective is to predict what would have happened but for the injury.

The basis of disability benefits, indeed the basis of workers' compensation in general, is the earning power of the individual worker. The Kansas Supreme Court has held that the loss of earning power of the workman is the theoretical basis for allowance of compensation. Gutierrez v. Harper Construction Co., 194 Kan. 287, 398 P.2d 178; Daugherty v. National Gypsum Co., 182 Kan. 197, 318 P.2d 1012.

Interwoven in these considerations is the long standing rule in Kansas that the Workers' Compensation Act is to be liberally construed, see, e.g. Chapman v. Wilkenson Co., 222 Kan. 772, 567 P.2d 888. Therefore, consideration of appellant's benefits should not be treated restrictively with a view to limit compensation, but rather to give claimant every reasonable benefit therein.

Workers' compensation is a creature of statute funded primarily by covered employers. The Fund itself is comprised of funds from insurance carriers, self-insurers and a tax levy. It is strictly a state program. Old age social security, on the other hand, is a federal program funded by tax on wages paid to an employee. Benefits are paid pursuant to federal law, rather than state.

In this case, appellant would be entitled to his remaining temporary total disability under the Workers' Compensation Act were it not for the application of the now repealed K.S.A. 44-510f(c). The statute emasculated payments received under the Kansas act since appellant became entitled to benefits pursuant to the Old Age and Survivors Insurance Program, Social Security, upon reaching the age of 65.

Thus, because appellant is a Kansas worker who was injured on the job between July, 1974, and July, 1977, and whose injuries occurred between the ages of 62 and 65, he must either forfeit his federal old age benefits (to which he contributed during his employment) or forfeit his workers' compensation benefits (for which he gave up his tort remedies regarding his injuries).

This patently unfair choice imposed upon appellant (and others similarly situated) is not only wholly unjust, but it also constitutes a violation of the due process and equal protection clauses of the United States Constitution because it is an undue discrimination which does not further the legislative intent.

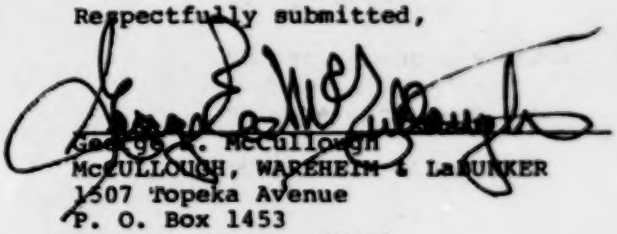
It is submitted that the statutory scheme envisioned by the Kansas Legislature in enacting this wage-loss legislation was to prevent duplication of benefits under the Workers' Compensation Act and the Social Security Act. The inherent difficulty with the statute as enacted is that it goes far beyond the legislative purpose and denies all benefits for workers' compensation if a claimant receives even one dollar

of old age social security. The act makes no attempt to prevent duplication of benefits for disability. Therefore, the classification based upon appellant's age cannot withstand constitutional challenge, as it is unreasonable and arbitrary and violates due process and equal protection. Henry v. Bauder, 213 Kan. 751, 518 P.2d 362; Pinkerton v. Schwiethale, 208 Kan. 596, 493 P.2d 200; Marshall v. Andrew F. Mahoney Co., 56 F.2d 74 (9th Cir. 1932); Massachusetts Board of Retirement, et al v. Murgia, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed2d 520 (Marshall, J. dissenting). See also, Brown v. Saginaw Metal Cnst. Plants, C.M. Div., 68 Mich.App. 85, 241 N.W.2d 769; Morales v. Mentor, 393 F.Supp. 88 (D.Mass. 1975); Wengler v. Druggists Mutual Ins. Co., 48 L.W. 4459 (April 22, 1980).

Conclusion

Appellant is entitled to both workers' compensation and old age Social Security. Neither has any relationship with the other, one is a state program, one is a federal program. Workers' compensation is based upon a contractual arrangement, Social Security benefits are derived from old age retirement insurance. Therefore, the classification imposed upon appellant by K.S.A. 44-510f(c) is discriminatory because of age, arbitrary and unreasonable. The statute did not bear a substantial and rational relationship to the purpose of its enactment. Most important, the arbitrary classification of workers by age frustrated the legislative scheme by shifting the economic loss due to injury from the employer to the employee.

Respectfully submitted,



George K. McCullough
McCULLOUGH, WAREHEIM & LaBUNKER
1507 Topeka Avenue
P. O. Box 1453
Topeka, Kansas 66601
(913) 233-2323
Attorneys for Appellant

No. 50,937

WILLIAM H. BROWN,
Appellant,

v.

GOODYEAR TIRE & RUBBER COMPANY and
TRAVELERS INSURANCE COMPANY and
WORKMEN'S COMPENSATION FUND,
Appellees.

MEMORANDUM OPINION

Review of the judgment of the Court of Appeals in 3 Kan. App. 2d 648, 599 P. 2d 1031. Appeal from Shawnee district court; ADRIAN J. ALLEN, judge. Judgment of the Court of Appeals affirming the district court is affirmed. Opinion filed April 5, 1980.

George E. McCullough, of McCullough, Wareheim & LaBunker, of Topeka, argued the cause and was on the brief for the appellant.

John C. Peterson, of Topeka, argued the cause and was on the brief for appellee, Workmen's Compensation Fund.

The opinion of the court was delivered by

MILLER, J.: This is a workmen's compensation case involving the application of K.S.A. 1974 Supp. 44-510f(c), since repealed. The examiner terminated claimant's disability benefits pursuant to that section of the act since claimant had attained age 65 and was entitled to and was receiving federal old age social security benefits. The order was sustained by the director, affirmed by the district court, and affirmed by the Court of Appeals. Brown v. Goodyear Tire & Rubber Co., 3 Kan. App. 2d 648, 599 P. 2d 1031 (1979). We granted review.

After carefully considering the record, briefs and arguments, we conclude that the Court of Appeals correctly disposed of each issue raised. We adopt the opinion of the Court of Appeals.

The judgment is affirmed.

HERD, J. dissenting: I respectfully dissent from the majority opinion. K.S.A. 44-510f(c), enacted in 1974 and repealed effective July 1, 1977, provided:

> "An employee shall not be entitled to compensation benefits for permanent total disability, temporary total disability or partial disability, under the workmen's compensation act, from and after the date when he shall be entitled to and during such period as he shall receive federal old age social security benefits, reduced or unreduced."

The claimant's injury occurred November 1, 1974, and April 7, 1975, during the effective period of the statute. On April 12, 1976, claimant was awarded medical expenses and temporary total disability from April 1, 1975, at the rate of $95.20 per week, not to exceed $50,000.00. The award was sustained by the Director of Workmen's Compensation on June 5, 1976, and by the District Court on February 11, 1977. Brown received compensation under the award until August 10, 1978, when his entitlement was terminated by the following order of The Workmen's Compensation examiner:

> "It Is Therefore, Considered, Ordered, Adjudged and Decreed that claimant's entitlement to workmen's compensation disability benefits ceased from and after September 5, 1977, and the Workmen's Compensation Fund has not and will not be liable to pay workmen's compensation benefits to claimant during such time as he shall receive federal old age Social Security benefits."

This order was sustained by both the director and the district court. It should be noted the order terminating the compensation and its effective date are both subsequent to the repeal of K.S.A. 1974 Supp. 44-510f(c).

We have repeatedly stated that the Workmen's Compensation Act should be liberally construed in order to award compensation to a worker where it is reasonably possible to do so. Thuillez v. Yellow Transit Freight Lines, 187 Kan. 618, 621, 358 P.2d 676 (1961); Bender v. Salina Roofing Co., 179 Kan. 415, 422, 295 P.2d 662 (1956); Bright v. Bragg, 175 Kan. 404, 264 P.2d 494 (1953); Hilyard v. Lohmann-Johnson Drilling Co., 168 Kan. 177, 180, 183, 211 P.2d 89 (1949); Matlock v. Hollis, 153 Kan. 227, 232, 109 P.2d 119 (1941). We should not ignore the precedent in this case.

Appellant raises three issues. His first issue questions the action of the Workmen's Compensation Fund in applying for an order terminating compensation under K.S.A. 1978 Supp. 44-528 without alleging the grounds enumerated therein. I have no quarrel with the ruling of the examiner who found he had authority under K.S.A. 1978 Supp. 44-534(a) to consider the controversy presented. In considering appellant's remaining issue, claimant argues K.S.A. 1974 Supp. 44-510f(c) is procedural rather than substantive and after repeal of the statute, the worker is entitled to all of his compensation pursuant to the award.

We set out the test for determining whether a statute is procedural in Ellis v. Kroger Grocery Co., 159 Kan. 213, 152 P.2d 860 (1944), where we held a statute which merely provides a method for the collection of future installments is procedural and is applicable to an award made prior to the statute's onactment. We also noted a

statute which does not alter an existing obligation does not disturb substantive rights and is remedial in nature. Here, the employer was under an obligation to pay the claimant a set sum per week not to exceed a stated minimum. That obligation did not grow or diminish with the repeal of K.S.A. 1974 Supp. 44-510f(c). Under the old statute, the worker had the choice of receiving social security benefits or continuing to receive workers' compensation benefits. After repeal a worker may receive both. The repeal does not increase an employer's obligation, which remains in effect until the worker exercises his option to choose. The employer's rights and obligations remain unchanged.

The repeal does not affect the original award, but pertains only to the impediment to receipt of benefits from both funds. The repeal of K.S.A. 1974 Supp. 44-510f(c) does not change or disturb the original workmen's compensation award.

In Crow v. City of Wichita, 222 Kan. 322, 566 P.2d 1 (1977), an injury occurred before the effective date of the statute in question, K.S.A. 1976 Supp. 44-512(a). We held the later statute should be applied since the statute was found remedial in character. Crow clearly shows the present law should control, even though the accident occurred under prior law, since the prior statute and the law that repealed it are remedial in nature.

Finally, claimant maintains K.S.A. 1974 Supp. 44-510f(c) is not applicable to his award because it violates his rights under the Fourteenth Amendment to the U.S. Constitution. A parallel issue was dealt with in Baker v. List and Clark Construction Co., 222 Kan. 127, 563 P. 2d 431 (1977), where this court found the "offset" provision of K.S.A.

1975 Supp. 44-510b(j) did not violate the U.S. Constitution. I don't think that decision should be dispositive of the issue in this case and call attention to Justice (now Chief Justice) Schroeder's dissent therein beginning at page 135.

The Workmen's Compensation Act creates new rights based on an employer's liability without fault when an employee is involved in an accident arising in the course of and out of his employment. Under this Act, an employee gives up his right to sue his employer under a theory of common-law liability based on fault. Workmen's compensation became the employee's exclusive remedy. We have described the employee's right to compensation as one based on contract between him and the employer. Note the following discussion in Daugherty v. National Gypsum Co., 182 Kan. 197, 202, 318 P.2d 1012 (1957):

> "The criterion for compensation under the statute is disability of the workman resulting from personal injury by accident arising out of and in the course of his employment. 'Disability' as used in G. S. 1955 Supp. 44-510(3)(c)(24) is the inability of the workman to perform work he was able to perform prior to his injury, and is the test by which compensation is measured for injury arising out of and in the course of his employment. [Citations omitted.] Any impairment of physical fitness due to injury is compensable under the statute either as temporary or permanent partial disability, or as a scheduled injury for the loss or loss of use of a member of the body. In Rupp v. Jacobs, [149 Kan. 712, 717, 88 P.2d 1102 (1939)], it was said:

'. . . The whole theory underlying the compensation act is that by reason of his accident the employer is required to compensate the workman for loss resulting by reason of his inability to perform the same labor he was able to perform prior to the injury.' . . . [Citations omitted.]

"Generally speaking, the loss of the earning power of the workman is the theoretical basis for the allowance of compensation. In a long line of decisions this court has held that loss of an injured workman's earning power may result from his ineligibility to obtain work as well as from inability to perform procurable work due to the impairment of his physical fitness, and that wages paid do not establish ability to earn. [Citations omitted.] Permanent partial disability of an injured workman based upon substantial medical testimony is compensable notwithstanding he may earn as much or more after his injury in the same or other employment. The rule is based upon the fact that partial general body disability is a definite loss to the injured workman, and is a deterrent to his obtaining and retaining work in the open labor market. [Citations omitted.]"

It is a mandatory creature of statute funded primarily by covered employers. Certain qualified employers are privileged to be self-insurers; the balance purchase insurance from companies which qualify to provide workmen's compensation coverage. The Workmen's Compensation Fund is made up of funds from insurance carriers, self-insurers and a tax

levy providing funds to pay the liability of insolvent employers. It is a state program.

Old age Social Security is a federal program funded by a tax on wages paid to an employee, one-half of which is paid by the employer and one-half by the employee. In the case of a self-employed person a tax is assessed on his net income. Benefits are paid pursuant to federal law, rather than state. Insured individuals are generally entitled to benefits depending upon average wages earned during their lives.

In this case, Brown was insured under the Old Age and Survivors Insurance program, called Social Security, and became entitled to benefits by virtue of having been in covered employment. He paid taxes into the fund for twenty quarters and reached 65 years of age. His benefits amounted to $371.90 per month.

Brown is entitled to both workmen's compensation and old age Social Security. Neither has any relationship with the other; one is a state program, one is a federal program. Workmen's compensation is based upon a contractual arrangement; these social security benefits derive from old age retirement insurance. 99 C.J.S., Workmen's Compensation § 330(g) states:

> "As a general rule, there can be no deduction from an award of compensation of payments or contributions received by an injured employee from sources other than the employer or his insurer . . . ."

In this case a military retirement pension, a V. A. disability pension or a private retirement plan would not have affected claimants workmen's compensation entitlement. By enacting K.S.A. 1974 Supp.

44-510f(c), the legislature attempted to prevent duplication of benefits from the two programs. Among the inherent difficulties with the statute as enacted is that it not only prevents duplication of benefits, but goes far beyond and denies all benefits from Workmen's Compensation if claimant receives even one dollar of old age social security. The act makes no attempt to prevent duplication of benefits for disability. The classification based on age is unreasonable and arbitrary and violates due process and equal protection. Pinkerton v. Schwiethale, 208 Kan. 596, 493 P.2d 200 (1972); Marshall v. Andrew F. Mahoney Co., 56 F.2d 74 (9th Cir. 1932). We stated in Henry v. Bauder, 213 Kan. 751, 753, 518 P.2d 362 (1974),

> "There must be some difference in character, condition, or situation, to justify distinction, and this difference must bear a just and proper relation to the proposed classification and regulation; otherwise, the classification is forced and unreal, and greater burdens are, in fact, imposed on some than on others of the same desert."

The case of Morales v. Mintor, 393 F. Supp. 88 (D. Mass. 1975) speaks to age discrimination. There, it was undisputed each plaintiff would have been eligible for General Relief Benefits, except for statutory age restriction. The court found the statute violated both due process and equal protection under the Fifth and Fourteenth Amendments of the U.S. Constitution. The court emphasized that any statute must have a justifiable basis, and fit into the overall legislative scheme. There was no justifiable basis for K.S.A. 1974 Supp. 44-510f(c), a fact recognized by the legislature in 1977, some three years later, when the statute was repealed. The former statute had the effect of giving an employee's social security benefits to the employer, benefits partially paid for by the employee.

Its provisions conflict with the purpose of the Workmen's Compensation Act, which is "to burden the industry with the economic loss to a workman, or his dependents, resulting from accidental injury sustained by the workman arising out of and in the course of his employment." Hilyard v. Lohmann-Johnson Drilling Co., 168 Kan. 177, 180, 211 P.2d 89 (1949). The arbitrary classification of workers by age in K.S.A. 1974 Supp. 44-510f(c) frustrated the legislative scheme by shifting the economic loss due to injury from the employer to the employee.

I would reverse the judgment of the trial court.

Schroeder, C.J., joins in the foregoing dissenting opinion.

No. 50,937

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

WILLIAM H. BROWN,
Appellant,

v.

GOODYEAR TIRE & RUBBER COMPANY and
TRAVELERS INSURANCE COMPANY and
WORKMEN'S COMPENSATION FUND,
Appellees.

SYLLABUS BY THE COURT

1.

In a workmen's compensation action, the fact that a litigant proceeds under an inappropriate procedural section does not necessarily deprive the director or examiner of the authority to determine the issue or controversy, provided the question is one that is under the general jurisdiction granted to the workmen's compensation director under K.S.A. 1978 Supp. 44-534.

2.

A motion to terminate a workmen's compensation award under the setoff provision of K.S.A. 1974 Supp. 44-510f (c) may be heard pursuant to the jurisdictional provisions of K.S.A. 1978 Supp. 44-53 even though the motion itself was submitted under another procedural section of the Workmen's Compensation Act.

3.

K.S.A. 1974 Supp. 44-510f (c) of the Workmen's Compensatio Act is substantive in nature.

4.

Legislative action which affects substantive rights operate prospectively, and as a result, does not affect any rights which hav vested prior to the effective date of the action.

5.

The repeal of a statute which is substantive in nature does not alter or terminate those rights which vested prior to the effective date of the repeal. K.S.A. 77-201.

6.

K.S.A. 1974 Supp. 44-510f (c) does not deny an injured claimant due process of law or violate the equal protection clause by creating a classification based on age, and therefore does not abridge the provisions of the Fourteenth Amendment of the United States Constitution.

7.

K.S.A. 1974 Supp. 44-510f (c) does not create an arbitrary classification lacking rational justification, even though such classification results in the termination of disability payments under the Workmen's Compensation Act for persons who have attained the age of sixty-five years and are receiving old age social securit benefits.

8.

K.S.A. 1974 Supp. 44-510f (c) is consistent with the syster of wage-loss compensation which forms the basis for the Workmen's Compensation Act.

Under the facts of this case, the workman's right to disability compensation became vested on the date of his injury and during the effective period of K.S.A. 1974 Supp. 44-510f (c), so that the termination of his disability payments under his award was proper when the workman became sixty-five and commenced receiving old age social security benefits.

Appeal from Shawnee District Court, division No. 4; ADRIAN J. ALLEN, judge. Opinion filed September 21, 1979. Affirmed.

George E. McCullough and John Ostrowski, of McCullough, Wareheim & LaBunker, of Topeka, for the appellant.

John C. Peterson, of Topeka, for the appellee Workmen's Compensation Fund.

Before FOTH, C.J., REES and SWINEHART, JJ.

SWINEHART, J.: Claimant William H. Brown appeals from an order terminating his workmen's compensation disability award payments. The order was based upon K.S.A. 1974 Supp. 44-510f (c), which was repealed effective July 1, 1977. Claimant specifies the trial court erred on three points: (1) permitting the Workmen's Compensation Fund to proceed on the motion for review and modification pursuant to K.S.A. 1978 Supp. 44-528; (2) refusing to find that the repeal of K.S.A. 1974 Supp. 44-510f (c) applied to his award; and (3) failing to hold K.S.A. 1974 Supp. 44-510f (c) unconstitutional.

The facts in this case are undisputed. On May 5, 1976, the examiner entered an order finding that the claimant was totally disabled as a result of a work-related accident suffered on November 1, 1974, and entered an award in his favor and against the Kansas Workmen's Compensation Fund. The claimant was awarded total disability benefits as well as medical expenses. The findings of the examiner were upheld by the director and were affirmed by the district court of Shawnee County.

On September 5, 1977, Brown became sixty-five years old and since that date has been entitled to and receiving federal old age social security benefits. On October 11, 1977, the Fund filed a motion for modification and termination of the disability benefits. In its motion the Fund sought an order terminating the claimant's workmen's compensation benefits as of September 5, 1977, on the ground that the claimant was no longer entitled to these benefits under the provisions of K.S.A. 1974 Supp. 44-510f (c), which was in effect on the date of the claimant's injury. Following a hearing on the motion the examiner entered an order terminating the claimant's disability benefits and stating that the Workmen's Compensation Fund would not be liable for further benefits to the claimant so long as

he received social security benefits. The order was sustained by the director and affirmed by the district court of Shawnee County.

The claimant's first point on appeal alleges procedural error. The Fund petitioned to terminate the claimant's benefits pursuant to the review and modification provisions of K.S.A. 1978 Supp. 44-528. Without question the facts of this case do not come within the purview of that statute. However, K.S.A. 1978 Supp. 44-534 provides that the workmen's compensation director does have authority to resolve disputes between claimants and respondents relative to the payment of benefits awarded under the act. Further, the parties appeared before the director on facts that were undisputed and the claimant has failed to show that any prejudice resulted from holding hearings on the termination motion. We therefor find that there was an adequate procedural basis under K.S.A. 1978 Supp. 44-534 to support the termination hearings.

The claimant next urges that K.S.A. 1974 Supp. 44-510f (c) was procedural and its repeal was applicable to the benefits he was to receive under his original disability award. As a result, he argues, his benefits should not be terminated as of his sixty-fifth birthday.

The Fund contends that the statute is substantive and the general rule that substantive rights are determined by the law in effect on the date of the injury should be invoked to permit the Fund to terminate claimant's disability benefits. In addition, it argues, a statute will not be given retroactive application if the result would impair vested rights in existence at the time of its passage. Eakes v. Hoffman-LaRoche, Inc., 220 Kan. 565, 552 P.2d 998 (1976).

When the claimant was injured on November 1, 1974, K.S.A. 1974 Supp. 44-510f (c) read as follows:

"(c) An employee shall not be entitled to compensation benefits for permanent total disability, temporary total disability or partial disability, under the workmen's compensation act, from and after the date when he shall be entitled to and during such period as he shall receive federal old age social security benefits, reduced or unreduced."

This section was repealed effective July 1, 1977.

Both parties agree that the issue turns on whether K.S.A. 1974 Supp. 44-510f (c) is determined to be procedural or substantive in nature. Neither party has cited any case law which directly answe this question. Claimant has characterized this action as one involving the collection of his award. The Fund argues that it is the amount and nature of the award itself which forms the basis of the action. The claimant relies upon Crow v. City of Wichita, 222 Kan. 322, 566 P.2d 1 (1977), which held that K.S.A.[1978 Supp.]44-512 was remedial and did not operate to impair vested rights of the workman or the employer. However, 44-512a governs the remedies which a claimant has when an employer or insurer defaults upon the compensati payments. This action is distinguishable from Crow because 44-512a does not alter the total amount due under a workmen's compensation award, but only affects the time when such payments become due. And further, since employers or insurance carriers retain total control over whether those payments are made in a timely fashion, they possess the ability to completely avoid the operation of the statute.

In Baker v. List and Clark Construction Co., 222 Kan. 127, 563 P.2d 431 (1977), the Supreme Court upheld the constitutionality of K.S.A. 1975 Supp. 44-510b (j), a setoff provision providing that workmen's compensation benefits owed to a deceased employee's dependents must be reduced by a specified formula if those dependents were also receiving social security benefits due to the death of the employee. During its discussion as to whether the statute offended the safeguards of procedural due process, the court noted that the

setoff provision became effective on July 1, 1974. The claimant's cause of action accrued on October 29, 1974, which was the date the employee sustained injuries resulting in his death, and therefore "[t]he appellant never had a vested right to benefits not allowed by the set-off provision." Baker, 222 Kan. at 133. Although Baker does not constitute a clear precedent for this action, the general scope of the discussion therein regards the statutory setoff provisions of the Workmen's Compensation Act as part of the substantive rights of the parties. Here the claimant was injured and an award was entered while the provisions of 44-510f (c) were in effect.

K.S.A. 77-201 provides:

> "First. The repeal of a statute does not revive a statute previously repealed, nor does such repe affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced, under or by virtue of the statute repealed."

Both this statute and Baker support the Fund's contention that the claimant's entitlement to workmen's compensation vested at the date of his injury in accordance with the provisions of 44-510f (c), in effect at that time. The repeal of that statute cannot now be used to increase those rights.

Accordingly, we find that K.S.A. 1974 Supp. 44-510f (c) is substantive in nature and its subsequent repeal does not affect an award for an injury sustained while it was in force. Since the claimant's entitlement to disability benefits became vested on the date of his injury, his award was subject to setoff provisions of 44-510f (c). The repeal did not increase the amount of Brown's dis ability payments by extending the time during which he could receive them beyond his sixty-fifth birthday.

Finally, the claimant urges that 44-510f (c) was unconstitu tional while in effect because it denied due process and violated

equal protection by creating a classification based upon age. Under the statute, disability benefits were to terminate from and after the date a claimant became entitled to and during which time he did receive old age social security benefits. The claimant contends that the district court erred in upholding the statute's constitutionality by relying upon Baker v. List and Clark Construction Co., 222 Kan. 127, which held that 44-510b (j) was constitutional. He asserts Baker is distinguishable because 44-510b (j) only partially reduced workmen's compensation benefits, whereas 44-510f (c) totally eliminates disability benefits when old age social security benefits are being received. Claimant also urges that in Boyd v. Barton Transfer & Storage, 2 Kan.App.2d 425, 580 P.2d 1366 (1978), this court should have addressed the constitutional question involved in this case. His citations of cases from other jurisdictions and from Larson's treatise on workmen's compensation provide only limited support for his arguments and need not be addressed here, since principles dispositive of the issue are contained in Baker and Boyd.

As noted above, Baker upheld 44-510b (j) which had been attacked as unconstitutional for (1) denying the right of due process, (2) violating the equal protection clause, and (3) impairing the obligation of contracts. Here, the first two of these challenges are made by claimant with respect to 44-510f (c). Both 44-510b (j) and 44-510f (c) are setoff provisions of the Kansas Workmen's Compensation Act as affected by the Social Security Act. Claimant first attacks the statute for creating an unconstitutional age classification discriminating against persons age sixty-five and over. Traditional equal protection rules must govern his challenge.

Baker acknowledged: "A state may create a statutory classification of persons within the scope of its police power. Classification necessarily involves discrimination. Yet it is only invidious discrimination with no rational basis for the statutory classification

that offends the equal protection guarantee." The classification must bear a fair and substantial relation to the purpose of the legislation. Baker v. List and Clark Construction Co., 222 Kan. at 130, relying upon Reed v. Reed, 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 251 (1971); Dandridge v. Williams, 397 U.S. 471, 25 L.Ed.2d 491, 90 S.Ct. 1153, rehearing denied 398 U.S. 914 (1970); Henry v. Bauder, 213 Kan. 751, 518 P.2d 362 (1974). Citing 4 A. Larson, The Law of Workmen's Compensation, §97.00, 97.10 (1976), and the Report on Kansas Legislative Interim Studies to the 1974 Legislature 3-1-1 the court characterized the Workmen's Compensation Act as a system of wage-loss protection, and preventing the duplication of benefits was viewed as a reasonable legislative objective. "It may be said that the classification created by the statute has a rational basis is not arbitrary, and affords like treatment to persons similarly situated." Baker, 222 Kan. at 132.

The court also disposed of the due process argument mounted in Baker by stating that the right to workmen's compensation benefit is substantially similar to the right to social security benefits. Richardson v. Belcher, 404 U.S. 78, 30 L.Ed.2d 231, 92 S.Ct. 254 (1971), held that a person covered by social security had no vested right in the accrued benefits and similarly the court in Baker said: "Before the cause of action accrues, the expectation of workmen's compensation benefits does not amount to a vested property right which cannot be taken away without a prior notice and hearing." Baker, 222 Kan. at 133. The cause of action accrued in Baker after the effective date of the setoff provision and consequently the claimant never had a vested right to benefits not allowed under the setoff provision. Further, due process essentially requires protection from arbitrary governmental action and the court found that 44-510b (j) did not display "a patently arbitrary classification lacking in rational justification so as to violate the due process clause." Baker, 222 Kan. at 134.

The setoff provision challenged in this action withstands allegations of unconstitutionality on grounds similar to those described in Baker. When viewed as part of a wage-loss compensation program, the termination of benefits under 44-510f (c), like 44-510b (j), does not really penalize the injured worker. By preventing a duplication of benefits under the Workmen's Compensation Act and the Social Security Act, the provision places the worker in the same position as fellow workers who have retired and are drawing old age social security benefits. At that point he is no longer subject to wage loss. It is only his disability benefits that are affected. After retirement the wage loss experienced by a worker is not caused by injury, but by retirement. A worker could retain workmen's compensation benefits by staying in the labor market and not retiring. The setoff provision of 44-510f (c) does not apply to any medical compensation that might be owed under an award of compensation.

The claimant argues that the purpose of the Workmen's Compensation Act "is to burden the industry with the economic loss to a workman, or his dependents, resulting from accidental injury sustained by the workman arising out of and in the course of his employment," Hilyard v. Lohmann-Johnson Drilling Co., 168 Kan. 177, 180, 211 P.2d 89 (1949), and that the "arbitrary" classification under 44-510f (c) frustrates this statutory purpose by shifting the economic loss to the employee. However, as already discussed above, this contention is without merit.

In Boyd v. Barton Transfer & Storage, 2 Kan.App.2d 425, the constitutionality of K.S.A. 1976 Supp. 44-510f (c) was directly challenged. However, we decided the case without reaching that constitutional question. Nevertheless, we find the dicta in Boyd, clearly supporting the constitutionality of the statute, persuasive in this action.

In Boyd we explained that 44-510f (c) was part of a plan to eliminate duplication of wage-loss benefits in the workmen's compensation program and the Social Security Act. The legislature promulgated the section to effectuate the primary purpose of the Workmen's Compensation Act, i.e., to compensate for actual or potential wage loss. Boyd, 2 Kan.App.2d at 426, 427, relying upon Report on Kansas Legislative Interim Studies to the 1974 Legislature Part 1. Boyd recognized that the reasoning in Baker v. List and Cl Construction Co., 222 Kan. 127, upholding the constitutionality of 44-510b (j), would equally apply to circumstances, such as here, where an injured worker would be subject to cutoff at retirement and upon receipt of old age social security benefits. Such a cutoff wou be reasonable because "continued workmen's compensation after retire ment would duplicate the wage-loss replacement of the old age social security benefits which begin at that time." Boyd, 2 Kan. App.2d at 428. The wage-loss theory provides a reasonable basis for the offse even if the social security benefits are lower than the workmen's compensation benefits, since the former amount is the same the work would have received even if he had retired without having been injured. We therefore find that 44-510f (c) is constitutional.

Claimant also interjects an argument based upon 29 U.S.C. § 623 (1976) with his discussion of the constitutional question. H argument that 44-510f (c) violates the federal provision is without merit. 29 U.S.C. § 623 provides:

> (a) "It shall be unlawful for an employer---
>
> . . . .
>
> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employe because of such individual's age. . . .
>
> . . . .
>
> (f) "It shall not be unlawful for an employer, employment agency, or labor organization---
>
> "(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this secti

> where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age."

Claimant urges that the entitlement to workmen's compensation benefits is a privilege of employees working in Kansas and as such is encompassed within 29 U.S.C. § 623. 44-510f (c) does not constitute employer discrimination on the basis of age. Even if the statute involved age discrimination, it would still be authorized under § 623 (f) (1) because "the differentiation is based on reasonable factors other than age," i.e., prevention of duplication of wage-loss benefits.

We hold that it was not error for the termination hearings to be conducted even though relief was sought under the provisions of K.S.A. 1978 Supp. 44-528, since statutory authority was available under K.S.A. 1978 Supp. 44-534 to support the relief requested; that K.S.A. 1974 Supp. 44-510f (c) is substantive and not procedural or remedial in nature; and finally, that K.S.A. 1974 Supp. 44-510f (c) was constitutional while in effect and did not deprive the claimant of his constitutional rights.

Judgment is affirmed.

FILED
AUG 6, 1980

IN THE SUPREME COURT OF THE STATE OF KANSAS

WILLIAM H. BROWN, Appellant,

vs. No. 50,937

GOODYEAR TIRE & RUBBER COMPANY
and TRAVELERS INSURANCE COMPANY
and WORKMEN'S COMPENSATION FUND, Appellees.

NOTICE OF APPEAL

Notice is hereby given that claimant-appellant, William H. Brown, appeals from the judgment of this Court rendered on April 5, 1980, rehearing denied May 19, 1980, to the Supreme Court of the United States.

The appeal hereby taken is directly to the Supreme Court pursuant to 28 United States Code §1257(2).

McCULLOUGH, WAREHEIM & LaBUNKER

By: _____
GEORGE E. McCULLOUGH
P. O. Box 1453
1507 Topeka Boulevard
Topeka, Kansas 66601
(913) 233-2323
Attorneys for Claimant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Notice of Appeal was mailed, postage prepaid, by United States mail to James E. Benfer, Esq., 1400 Topeka Boulevard, P. O. Box 2217, Topeka, Kansas 66601 and John C. Peterson, Esq., 820 Quincy, Suite 610, Topeka, Kansas 66612, on this _____ day of August, 1980.

_____
GEORGE E. McCULLOUGH

IN THE SUPREME COURT OF THE STATE OF KANSAS

William H. Brown, Appellant,

v.

Goodyear Tire & Rubber Company and Travelers Insurance Company, and Workmen's Compensation Fund, Appellees.

No. 39,[illegible]

You are hereby notified of the following action taken in the above entitled case:

Motion by Appellant for Rehearing.

Considered and DENIED.

Date May 19, 1950

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court